HO YEE CHIN v. HO MIN HAO & ORS

HIGH COURT MALAYA, IPOH
SM KOMATHY JC
[ORIGINATING SUMMONS NO: 24NCVC-249-06-2015]
3 MAY 2016

COMPANY LAW: *Director – Fiduciary duties – Request for inspection of company's accounts – Whether right to inspect connected to discharge of director's duties – Whether director obliged to provide reason for request – Director never took part in management of company – Whether still entitled to right to inspect – Whether request proven to be for ulterior or improper purpose – Companies Act 1965, s. 167(6)*

The plaintiff and the first and second defendants were the directors of the third defendant ('the company'), a family business which was incorporated by the plaintiff's father. The first shareholders and directors of the company were the plaintiff, her two sisters and her sister-in-law, the mother of the first and second defendants. The plaintiff was never involved in the management and running of the company but was a cheque signatory of the company's bank accounts. The relationship between the plaintiff and the first and second defendants deteriorated following the plaintiff's request to examine the company's books and accounts. The plaintiff stated that she was given a draft 'Annual Report and Financial Statements 31 December 2013' to sign and to affirm on oath under a statutory declaration. Upon perusal, the plaintiff had some concerns about some of the transactions recorded in the accounts and thus sought explanation from the company. However, her concerns were not specifically address by the company nor the first and second defendants. Hence, the plaintiff sought an order under s. 167(6) of the Companies Act 1965 ('the Act') for an auditor to inspect the company's accounting and financial records on her behalf. The first and second defendants resisted the application. The crucial point for consideration in the application was the scope of the exceptions and limitations of a director's right to inspect the company's accounts under s. 167(6) of the Act.

Held (allowing plaintiff's application):

(1) The court can refuse to aid a director to enforce his right to inspect where it is shown that the purpose of the inspection is for an ulterior or improper purpose. As the statutory right to inspect the company's books is conferred on a director for the purpose of enabling him to carry out his duties as a director, he can only invoke the right to inspect for purposes connected to the discharge of his director's duties. As the plaintiff was still a director at the time she requested for the company's records, she was not obliged to provide a reason for her request. The onus was on the defendants to prove *mala fides* and unless the burden was discharged, it must be assumed that the plaintiff would exercise the right for the benefit of the company. (paras 15 & 17)

(2) A director who does not take part in the management remains liable as a director with fiduciary and statutory duties and for the discharge of these duties, the plaintiff must hold the right to inspect. The plaintiff wished to inspect the accounting records of the company as she found discrepancies in the company's 2013 year-end financial statements submitted to her for her signature. The plaintiff was responsible for the accuracy of the information contained therein and it was her bounden duty to ensure and verify them, failing which she would be guilty of negligence and dereliction of duties. There was no merit in the contention by the first and second defendants that the fact that the plaintiff had never run or managed the business from the day it was incorporated until this application was made suggested that the plaintiff sought inspection, not to discharge her duties as director. The right of inspection by a director is an inalienable right and is not restricted in any way. (paras 18 & 19)

(3) The fact that the plaintiff had made an *ultimatum* to her sisters about liquidating the assets of the company did not, *ipso facto*, demonstrate that she had an improper or ulterior purpose in making the application. If the company's accounts were in order, the defendants had no reason to resist the application. There was no clear proof that the plaintiff intended to exercise her right of inspection as a director for an ulterior or improper purpose. In the absence of clear proof, it was held that the right to inspect the accounts was related to the plaintiff's discharge of her director's duties. (paras 20-22)

(4) When there is suspicion and lack of co-operation, a director is all the more entitled, perhaps even obliged, to inspect company's accounts to protect the interests of the company and its shareholders. A dispute between shareholders is not a dispute with the company nor harm to the company. The relationship between the plaintiff and her co-directors had deteriorated and both were suspicious of each other. The plaintiff suspected the books of accounts were not properly kept and that was reason enough to permit the plaintiff to examine the same as there was a criminal penalty for not keeping proper books of accounts. (para 23)

Case(s) referred to:

Conway v. Petronius Clothing Co Ltd [1978] 1 All ER 185 ***(refd)***

Dato' Tan Kim Hor & Ors v. Tan Chong Consolidated Sdn Bhd [2008] 1 LNS 741 CA ***(refd)***

Hau Tau Khang v. Sanur Indonesian Restaurant Pte Ltd and Another (Hau Tau Thong, non party) and Another Matter [2011] 3 SLR 1128 ***(refd)***

Mirza Mohamed Tariq Beg Mirza HH Beg v. Perunding Pakarmedia Sdn Bhd [2009] 10 CLJ 273 HC ***(refd)***

Oxford Legal Group Ltd v. Sibbasbridge Services Plc And Another [2008] EWCA Civ 387 ***(refd)***

Welch and Another v. Britannia Industries Pte Ltd [1992] 3 SLR(R) 64 ***(refd)***

Wuu Khek Chiang George v. ECRC Land Pte Ltd [1999] 3 SLR 65 ***(not foll)***

Legislation referred to:
Companies Act 1965, s. 167(6)

For the plaintiff - Justin TY Voon; M/s Justin Voon Chooi & Wing
For the 1st & 2nd defendants - Peter Douglas Ling; M/s Peter Ling & Co
For the 3rd defendant - Purshotamdas Nathermal Thadani; M/s Lalchand & Nawawi

Reported by S Barathi

JUDGMENT

SM Komathy JC:

[1] The plaintiff is a director of the third defendant company, Sri Magjuta Sdn Bhd ("Sri Magjuta" or "the company"). She seeks an order under s. 167(6) of the Companies Act 1965 for an auditor to inspect the company's accounting and financial records on her behalf. Her co-directors, the first and second defendants resist the application.

[2] The scope of the exceptions and limitations of a director's right to inspect company's accounts under s. 167(6) is a crucial point that arises for consideration in this application.

The Facts In Brief

[3] The plaintiff is the aunt of the first and second defendants. The three of them are the directors of Sri Magjuta.

[4] Sri Magjuta was incorporated on 7 September 1996, by the plaintiff's father, the late Hoo An Kee @ Ho Fong Shun ("HAK"). The first shareholders and directors of Sri Magjuta were the plaintiff, her two sisters and her sister-in law, the mother of the first and second defendants. It was a family business that was operated in Simpang Pulai, Perak by HAK, his wife, and the first and second defendants' father, Ho Yee Chee ("HYC"), who were all undischarged bankrupts at the material time.

[5] The plaintiff resided and worked in Kuala Lumpur and was never involved in the management and running of the company. During that time, the plaintiff was a cheque signatory of the company's bank accounts and at the request of HAK had signed and approved the company's accounts. However, after HAK passed away in 2012, the relations between the plaintiff and the first and second defendants deteriorated following the plaintiff's request to examine the company's books and accounts.

Grounds For The Plaintiff's Application To Inspect

[6] In support of the application, the plaintiff filed an affidavit stating that she was given a draft "annual report and financial statements 31 December 2013" to sign and to affirm on oath under a statutory declaration. Upon a perusal of the same, she had some concerns about some

of the transactions recorded in the accounts. By a letter dated 9 January 2015, her solicitors sought an explanation from the company but her concerns were not specifically addressed by the latter nor the first and second defendants.

[7] The plaintiff also asserts that she is entitled to inspect the accounting records as she is a guarantor of banking facilities for the company and the banking facilities have escalated over time. As such, she would has to be responsible and liable for the financial obligations if the company was not well managed financially.

The Arguments

[8] Mr Justin TY Voon's submission on behalf of the plaintiff was that as a director, she had an absolute statutory right under s. 167(6) of the Companies Act to inspect the company's accounting and financial records. The only exception which has been recognised to date is that it could be lost if the defendants could show that the purpose for which she sought inspection was to injure the company.

[9] The first and second defendants' objection to the application was twofold. First, the plaintiff had no right to inspect the company's books of accounts as she was a director and shareholder in name only. She held the shares on trust for the first and second defendants and was for all purposes only a sleeping director in the company and had never been involved in the running and management of the company.

[10] Secondly, the exercise of the plaintiff's right to inspect in this case was for an ulterior or improper purpose, *to wit*, to further her own personal interest. Counsel for the first and second defendants, Mr Peter Ling Cheng Chai contended that the plaintiff's desire to inspect was not to discharge her duties as a director but to ascertain the value of the company and her 58% share (with her husband) and to liquidate the assets of the company. He referred to the fact that when the plaintiff's sisters brought the annual accounts for 2013 for plaintiff's signature, the plaintiff refused to sign the annual accounts and instead gave her two sisters three *ultimatums* – (a) for the family to pay her RM3.5 million for her husband's and her shares in the company or (b) to sell all the assets of the company and pay her and her husband 58% of the proceeds or (c) allow the bank dispose of all the company's assets. Mr Peter Ling urged the court to dismiss the application as the plaintiff did not seek inspection to enable her to discharge her duties as a director.

Right Of Inspection Under s. 167

[11] The court's power to order inspection is encapsulated in s. 167(6) of the Companies Act. So far as material for present purposes, s. 167 provides as follows:

> (1) Every company and the directors and managers thereof shall cause to be kept such accounting and other records as will sufficiently explain the transactions and financial position of the company and

enable true and fair profit and loss accounts and balance sheets and any documents required to be attached thereto to be prepared from time to time, and shall cause those records to be kept in such manner as to enable them to be conveniently and properly audited.

(3) The records referred to in subsection (1) shall be kept at the registered office of the company or at such other place in Malaysia as the directors think fit and shall at all times be open to inspection by the directors.

(6) The Court may in any particular case order that the accounting and other records of a company be open to inspection by an approved company auditor acting for a director, but only upon an undertaking in writing given to the Court that information acquired by the auditor during his inspection shall not be disclosed by him except to that director.

[12] The principles which govern the approach of a court when deciding whether to order that the accounting records and other records of a company should be produced for inspection by a director are explained in the judgment of the Court of Appeal in *Dato' Tan Kim Hor & Ors v. Tan Chong Consolidated Sdn Bhd* [2008] 1 LNS 741; [2009] 2 MLJ 527. It was held that a director has an absolute right to inspect the accounting books and other records of a company under s. 167(6) of the Companies Act and does not need to furnish any particular reason for his request for inspection. In his judgment, Low Hop Bing JCA, cited with approval the observations of LP Thean JA in the Singapore case of *Wuu Khek Chiang George v. ECRC Land Pte Ltd* [1999] 3 SLR 65, as regards the rule that a director has an absolute right of inspection:

The relevant established principles have been succinctly stated by the Singapore Court of Appeal in *Wuu Khek Chiang George*. ... that:

(1) the right of a director of a company to inspect its accounting and other records is a right existing at common law and is recognised in s 199 of the Companies Act. Such right is a concomitant of the fiduciary duties of good faith, care, skill and diligence which the director owes to the company, and as such, like other rights and powers, must be exercised for the benefit of the company. The obligation of the company to allow inspection by its director is mandatory;

(2) this right has been described as being 'absolute'. A director is *prima facie* entitled to inspection and is not required to demonstrate any particular ground or 'need to know' as a basis: *Molomby*. So long as the right is exercised for the proper performance of the director's duties to the company and not with a view to causing any detriment to the company, it is in that sense 'absolute': see eg, *Dato Aw Kow v. Haw Par Bros (Pte) Ltd* [1972] 2 MLJ 225; [1972-1974] SLR 391, *Haw Par Brothers v. Dato Aw Kow* [1973] 2 MLJ 169; [1972-1974] SLR 183; *Leong Sun Wing v. Wah Hup Engineering Works Sdn Bhd (No 2)* [1977] CSLR VII [1003]; *Molomby*; *Welch & Anor v. Britannia Industries*

A *Pte Ltd* [1993] 1 SLR 673; *Edman v. Ross* (1922) 22 SR (NSW) 351; and *Conway & Ors v. Petronius Clothing Co Ltd & Ors* [1978] 1 All ER 185; [1978] 1 WLR 72;

(3) there is no residual discretion in the court to refuse inspection. Where the court bars a director from exercising his right of
B inspection, it is not in fact exercising a residual discretion, but is in such an event satisfied on the basis of the evidence before it that the director's intention is to use the information obtained for ulterior purposes such as with a view to causing detriment to the company and that the director is thus abusing the confidence reposed in him; *Berlei Hestia (NZ) Ltd v. Fernyhough* [1980] 2 NZLR
C 150 per Mahon J;

(4) the right of a director to inspect the books and records of the company flows from his office as a director and enables him to perform his duties as a director. The corollary of this is that the right will be lost where it is exercised not to advance the interests of the
D company but some other ulterior purpose to injure the company: *Edman v. Ross*, *Molomby*; *Deluge Holdings Pty Ltd & Anor v. Bowlay & Ors* [1991] 9 ACLC 1486; *Welch & Anor; Re Geneva Finance Ltd (Receiver and Manager Appointed)* (1992) 10 ACLC 668; and *Paul Nicholson lwn. Faber Medi-Serve Sdn Bhd dan lain-lain* [2002] 1 MLJ 355 ...

E In our view, s 167(6) is intended to facilitate and liberalise, and is not meant to impede, the right of inspection. Indeed, almost unbridled powers are conferred upon the court to give effect to the directors' right of inspection. Clearly, it is within the powers of the court to allow the plaintiffs to furnish a fresh undertaking by the auditor in terms as required by the court, by addressing it to the
F court and by deleting therefrom the words relating to the appointed servants/agents. This is especially so after the learned judge had arrived at a specific decision that the defendant had, in the first instance, failed to discharge its burden to show that the plaintiffs' inspection would result in any detriment to the interests of the defendant. That is a reaffirmation that the right of inspection by the
G plaintiffs as directors of the defendants pursuant to s 167(6) is 'absolute'.

[13] The parties accepted the foregoing as an authoritative statement of the law in this area, but were in disagreement as regards the scope of the exceptions and limitations to the rule that a director has absolute right. The
H plaintiff took the position that the decision of the Court of Appeal was authority for the proposition that injury to the company was the only exception to the rule that a director has an absolute right of inspection. On the other hand, the first and second defendants contended that intention to injure the company constituted only one of the exceptions to this rule. The
I scope of the exceptions to the absolute right rule, argued Mr Peter Ling, was not as narrow as suggested by the plaintiff. He argued that the right can also be forfeited if the director sought inspection for any purpose unconnected to the discharge of his director's duties.

[14] The question of whether there is only one exception to the right to inspect was examined by the English Court of Appeal in *Oxford Legal Group Ltd v. Sibbasbridge Services Plc And Another* [2008] EWCA Civ 387. In this regard, Sir John Chadwick in referring to the Singapore's decision in *Wuu Khek Chiang George* observed:

> In *Wuu Khek Chiang George v. ECRC Land Pte Ltd* [1999] 3 SLR 65 the Court of Appeal in Singapore referred (*ibid*, 78G, at [32]) to the director being refused inspection when the court was satisfied "that the intention of the director in inspecting the books and records is to make use of the information for ulterior purposes such as with a view to causing detriment to the company". At paragraph [33] (*ibid*, 78H-I) the court said this ... .
>
> The right of a director to inspect the books and records of the company flows from his office as a director ... . So long, therefore, as such right is exercised for that purpose and not with a view to causing detriment to the company, the right to inspect is 'absolute'. In this sense and to that extent, the right may be termed 'absolute'. The corollary of this is that the right will be lost where it is exercised not to advance the interests of the company but for some ulterior purpose or to injure the company ...
>
> It is for those who oppose the director's right to inspect to show 'clear proof' and to satisfy the court 'affirmatively' that the grant of the right of inspection would be for a purpose which would be detrimental to the interests of the company. There must be a 'real ground' that the right would be abused and that substantial harm would be caused to the company thereby.
>
> The appellant, of course, relies on that final passage. But, when read in conjunction with the earlier passages which I have cited, it is, I think, reasonably clear that the court did not intend a distinction between "some ulterior purpose" (not involving injury to the company) and "a purpose which would be detrimental to the interests of the company". The true distinction is that drawn in paragraph [33] of its judgment: a distinction between the director's exercise of the right "in the proper performance of his duties" and his exercise of the right "not to advance the interests of the company but for some ulterior purpose". Properly understood, as it seems to me, the decision in *Wuu Khek Chiang George v. ECRC Land Pte Ltd* does not support the proposition that the circumstances in which the court will refuse to enforce the right to inspect are confined to those in which the purpose for which the director sought inspection is to injure the company ...
>
> But the better view, as it seems to me, is that the judge recognised, correctly, that if it were clearly shown that a director was using the right to inspect for an improper purpose then the court had no power to assist him. The court could not aid the use of the right for a purpose for which it was not conferred. I agree with the view expressed by Mahon J in the *Berlei Hestia* case (*ibid*, 163 lines 31-32) - and by the Court of Appeal in Singapore in *Wuu Khek Chiang George v. ECRC Land Pte Ltd* [1999] 3 SLR 65, 78 at 32 - that Slade J was wrong to think (if he did) that, in refusing

A to assist a director who was shown to be invoking the right to inspect for an improper purpose, the court was exercising a discretion. Rather, as it seems to me, in refusing to assist in such a case the court would be recognising and giving effect to the true nature of the right. It follows, in my view, that it is not open to the court to refuse its assistance in a case where it has no reason to think that the director is using the right to
B inspect for an improper purpose.

[15] For the reasons elucidated by Sir John Chadwick, I agree with his view that the case of *Wuu Khek Chiang George* is not authority for the proposition that there is only one exception or limitation to the rule that a director has an absolute right to inspect the company's accounts. It is clear
C that injury to the company is too narrow an approach and the correct approach is that the court can refuse to aid a director to enforce his right to inspect where it is shown that the purpose of the inspection is for an ulterior or improper purpose. As the statutory right to inspect the company's books is conferred on a director for the purpose of enabling him to carry out his
D duties as a director, he can only invoke the right to inspect for purposes connected to the discharge of his director's duties.

[16] See also *Hau Tau Khang v. Sanur Indonesian Restaurant Pte Ltd and Another (Hau Tau Thong, non party) and Another Matter* [2011] 3 SLR 1128.

E **Discussion**

[17] As the plaintiff is still a director at the time she requested for the company's records, she is not obliged to provide a reason for her request. Instead, the onus lies on the defendants to prove the *mala fides* they are alleging. Unless this burden is discharged to the satisfaction of the court, it
F must be assumed that the plaintiff will exercise this right for the benefit of the company.

[18] The plaintiff's *prima facie* right to inspect the records of the company is clear. She wishes to inspect the accounting records of the company as she found discrepancies in the company's 2013 year-end financial statements
G submitted to her for her signature. She needs those records to examine the propriety of certain transactions listed therein. This is something that as director, she ought to be doing before signing the 2013 annual financial report. She is responsible for the accuracy of the information therein and it is her bounden duty to ensure and verify them failing which she would be
H guilty of negligence and dereliction of duties. A director who does not take part in the management continues to remain liable as a director with fiduciary and statutory duties for the discharge of these duties, the plaintiff must continue to hold the right to inspect. Notwithstanding the fact that the plaintiff left it to the defendants to conduct the company's affairs, as long as
I she continues to be a director, she must, at all times, be at liberty to satisfy herself as to all and any matter in relation to the company's business.

[19] The law confers upon the plaintiff the right of inspection to enable her to carry out her duties under the Companies Act. The plaintiff remains liable as a director with statutory duties whether she has taken part in the management of the company or otherwise. It does not stand to reason that she could be held liable for breach of duties as a director but, on the other hand, not allowed full rights and access and the right of inspection to enable her to take steps to avoid liability for breach of those duties. I therefore find no merit in the contention by the first and second defendants that the fact that the plaintiff has never run or managed the business from the day it was incorporated until this application was made suggested that the plaintiff seeks inspection not to discharge her duties as director. The right of inspection by a director is an inalienable right and not restricted in any way by the fact that the director did not take part in the management of the company.

[20] Next, I turn to examine the contention by the first and second defendants that the plaintiff seeks inspection for an ulterior or improper purpose. The fact that the plaintiff had made an *ultimatum* to her sisters about liquidating the assets of the company, does not *ipso facto* demonstrates that she has an improper or ulterior purpose in making this application. If the company's accounts are in order, the defendants have no reason to resist the application. There is no clear proof that the plaintiff intends to exercise her right of inspection as a director for an ulterior or improper purpose and not for the purpose identified in the application for the inspection.

[21] In the absence of clear proof, the court must assume that the plaintiff will exercise the right in aid of the execution of her duties. Slade J's description of the rationale for this description of this rule is found in the case of *Conway v. Petronius Clothing Co Ltd* [1978] 1 All ER 185:

> Although a director will not in general be called on to furnish his reasons before being allowed to exercise his right of inspection the court would in my judgment in such a case restrain him in the exercise of the right, if satisfied affirmatively that his intention was to abuse the confidence reposed in him as director and materially to injure the company. In my judgment, however, in the absence of clear proof to the contrary, the court would in such a case assume that he was exercising it for the benefit of his company. It will be seen that the proposition contained in this present paragraph is derived from the passage from Street J's judgment in *Edman v. Ross* ((1922) 22 SR(NSW) 351 at 361) which has already been cited. This passage seems to me, if I may say so, consistent with both principle and common sense. If the position were otherwise, a director's rights of inspection could be rendered more or less nugatory, at least for many months, by specious allegations that he was exercising them with intent to injure the company or for other improper motives.

[22] It is therefore incumbent on the court to ensure that a director's right to inspect the books and documents of the company is not rendered nugatory by delay while the court embarks on a prolonged examination of her motives

for seeking to exercise that right. I therefore hold that the right to inspect the accounts is related to the plaintiff's discharge of her director's duties.

[23] There is judicial *dicta* to the effect that when there is suspicion and lack of co-operation, a director is all the more entitled, perhaps even obliged, to inspect company's accounts to protect the interests of the company and its shareholders. The right is not only to be exercised or the duty imposed when there is harmony within the company. A dispute between shareholders is not a dispute with the company nor a harm to the company. I agree with this view. See *Welch and Another v. Britannia Industries Pte Ltd* [1992] 3 SLR(R) 64 and *Mirza Mohamed Tariq Beg Mirza HH Beg v. Perunding Pakarmedia Sdn Bhd* [2009] 10 CLJ 273, 279. The facts of this case show that the relations between the plaintiff and her co-directors have deteriorated and both are suspicious of each other. The plaintiff suspects the books of accounts are not properly kept. That is reason enough to permit the plaintiff to examine the same as there is a criminal penalty for not keeping proper books of accounts.

Conclusion

[24] For the reasons stated, I allow the plaintiff's application to inspect the accounting books of the company. The defendants to pay the plaintiff's costs of RM5,000.